Supreme Court, U.S.
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In The
Supreme Court Of The United States

JOSEPH CALDRELLO AND SANDRA CALDRELLO
Petitioners

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
AND REPUBLIC CREDIT CORPORATION, I
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED FOR REVIEW

Whether the Connecticut Courts erred by failing to grant to the defendants, Joseph and Sandra Caldrello, due process under the law. Specifically, whether the Connecticut Courts erred in determining that the actions of the original plaintiff, First Constitution Bank, its successor, the Federal Deposit Insurance Corporation, and the additional plaintiff, Republic Credit Corporation, I, both before, at, and importantly after the second trial of this case, did not amount to an improper taking of the Caldrello property and the violations of their rights under the 4th, 5th, 7th and 14th amendments.

In addition the Connecticut Courts erred by not, as a result of the actions as recited herein, by not granting to the Caldrellos a new trial, in front of a jury, as to the merits of this case.

PARTIES TO APPEAL

1. Federal Deposit Insurance Corporation,

   Plaintiff-Respondent

2. Republic Credit Corporation, I,

   Plaintiff-Respondent

3. Joseph Caldrello,

   Defendant-Petitioner

4. Sandra Caldrello,

   Defendant-Petitioner

Note: There are a large number of additional parties who did not participate in the trials or appeals of this matter and for that reason are not identified.

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OPINION BELOW

The opinion of the Appellate Court of the State of Connecticut is reported at FDIC v. Caldrello, 68 Conn. App. 68 (2002), the denial of the writ of certiorari to the Supreme Court of the State of Connecticut is reported at FDIC v. Caldrello, 260 Conn. 903 (March 14, 2002), Appendix, infra.

JURISDICTION

The denial of the writ of certiorari to the State of Connecticut Supreme Court was released on March 14, 2002. The jurisdiction of this court is invoked pursuant to Rule 10(c) of the Supreme Court Rules.

COURSE OF PROCEEDINGS

This foreclosure case was originally filed in the Connecticut Superior Court, Judicial District of New London, at New London, on July 31, 1989 by the then plaintiff, First Constitution Bank.

The plaintiff obtained a judgement in its favor on September 8, 1992. Such judgment was appealed to the Appellate Court of the State of Connecticut by the defendants, Joseph and Sandra Caldrello.

Prior to the appeal being heard the plaintiff failed and was

taken over by the Federal Deposit Insurance Corporation who was substituted as the plaintiff. The FDIC then removed the matter to the Federal District Court for the District of Connecticut. The matter was subsequently remanded back to the State of Connecticut Appellate Court, where the appeal was heard and decided in favor of the appellants.

Sent back to the trial court the plaintiff failed to appear at a scheduled pre-trial, and were non-suited. Despite failing to move to re-open in the normal time period given under the Connecticut Rules of Practice the FDIC was allowed to open up the judgment of non-suit.

After the case was re-opened a second trial was held. On October 7, 1999, after that trial, the FDIC got judgment in its favor. That judgment was appealed by the defendants, Joseph and Sandra Caldrello and on January 25, 2002 the Appellate Court for the State of Connecticut denied the appeal. While the appeal was pending the plaintiff, Republic Credit Corporation I purchased the note and mortgage from the FDIC and became a party plaintiff.

A petition for certification to the Supreme Court for the

State of Connecticut was filed on February 13, 2002 and denied on March 14, 2002. This petition for certification follows.

STATEMENT OF THE CASE

A. Background of the case.

On its face this matter would seem to be a simple foreclosure. That is not the case. Ultimately this matter deals with issues of fundamental fairness and due process.

Simply put, certain actions of the First Constitution Bank before it failed, actions of the FDIC after the First Constitution Bank failed, and actions of Republic Credit Corporation, I after the FDIC purported to transfer these assets to it were all show a continuing course of conduct which require that a new trial be given to the defendants.

It is important to note that although some of these actions complained of occurred before the FDIC took over the asset, and before the second trial of this matter, many of them took place afterwards.

In testimony in front of the trial court, the defendants presented evidence that the First Constitution Bank had

misplaced funds belonging to the defendants, and that this misplacement of funds had created an inability on the part of the defendants to pay the mortgage.

The evidence presented was that Mr. Caldrello had deposited a $500,000.00 cashier's check into his personal account, that drawing on these good funds he deposited $300,000.00 into one of his business accounts, and that this later deposit was not properly credited by the bank. As a result of this mistake by the bank, which was never acknowledged by bank officials, checks drawn on the business account were not honored causing serious and permanent harm to Mr. Caldrello.

In addition it was claimed that the bank had improperly released, out of escrow and without Mr. Caldrello's permission, stock in one his company's to a third party. Such stock was valued at 3.5 million dollars, and was security for a loan for which Mr. Caldrello obtained the $500,000.00 check discussed above.

Bank records introduced into evidence showed the bank redepositing the funds on an official bank holiday, obviously an impossibility. However, as recited, the bank officials never told

Mr. Caldrello it had allegedly redeposited the funds.

This evidence was not seriously challenged by the plaintiff. Some of this evidence shows that a fraud was perpetuated.

In addition a number of factors show that a continuing course of conduct, still ongoing, has occurred. That continuing course of conduct amounts to a fraud upon the court. The conduct, includes that recited hereinbefore and the following, but is not limited by this submission.

At the first trial of this case a then official of the First Constitution Bank testified about the origin of certain purported bank records. These records purported to show that the loan was current and in fact there was an escrow balance in excess of $70,000.00. At the first trial he could not identify the document as a bank document.

When called to testify at the second trial his testimony was quite different, and identified it as a bank document but disagreed about its purported import. None-the-less, when asked about it he stated that had he gotten it he would have tried to withdraw the excess escrow funds. He also testified differently about payments made on the underlying loan and

about alleged writedowns on the loan.

A bank official testified that the loan to the defendants had been written down by the bank, but that no IRS form 1099 had ever been sent to the Caldrellos, despite the fact that such was required by the tax laws.

At the second trial a representative of the FDIC misrepresented to the court the true effect of certain bank documents.

At the second trial an officer of the FDIC testified that it was proper for the FDIC to give verbal consent to a tax sale when in fact the FDIC's established rules and procedures required written consent using a specific form.

The FDIC and Republic never produced certain documents requested by the defendants and which were in their possession. This included some of the original documents produced prior to the first trial by the defendants, of which there have been a number of unsuccessful attempts to obtain them.

The FDIC agreed not to transfer the property subject of this lawsuit while litigation was pending and did so anyway.

The FDIC sold the property before the underlying litigation was concluded.

The FDIC never produced at trial the original loan documents.

The FDIC sold this property without the benefit of a public sale or auction. In connection with this, there were at least two persons in the New London area who communicated with the FDIC about purchasing this asset. Rather than let them make competitive bids the FDIC sold the property to Republic Credit for an undisclosed amount.

In connection with the sale the FDIC apparently sold assets worth well over a million dollars for the sum of $10.00, giving these away for the sole purpose of depriving the defendants of them.

Upon information and belief, the FDIC also improperly transferred the property using an out of date power of attorney that, on its face, could not be used to transfer these assets.

The FDIC made a claim against the successor to the First Constitution Bank and/or an insurance fund directly related to claims made by the defendants, and collected on those claims

without notifying the defendants that they had done so.

Nor did the FDIC give the defendants any credit for the amounts that they received from the successor to First Constitution Bank and/or the insurance fund.

In a tax sale of the subject property, additional property belonging to the Caldrello children was included in the description purportedly conveying the subject property. The FDIC and Republic have both acknowledged that the additional property should not have been conveyed, but despite repeated demand have not provided the Caldrello children with quit-claims deeds to the property.

As to such tax deed the FDIC had a duty to make sure the deed was correct before it recorded it and failed in its duty. Once it became aware of the deficiency in the deed it had a duty to correct it, and it never has taken any steps to do so.

In connection with such sale the FDIC allowed it to occur despite the fact that the FDIC could have blocked the sale pursuant to 12 USC 1825(b), the tax warrants used for the sale were improper, were not served properly, and the FDIC did not give permission for the sale with the proper method and

form.

The attorney for the FDIC represented that the FDIC would not use a tax sale to try to short circuit this particular litigation, but in fact it attempted to do just that.

The net result of all of the actions of officials of First Constitution Bank, the FDIC and Republic may amount to criminal behavior. It certainly amounts to improper and unlawful behavior.

All of this had and has a continuing effect on Mr. Caldrello and in particular his wife and their three children.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting the writ in this case. This Honorable Court should grant certiorari because the failure to do so would result in a grave miscarriage of justice. Although this case does not deal with the application of the federal rules as it did the case decided by this Honorable Court of United States v. Beggarly, 524 U.S. 38 (1998) the facts of this case clearly implicate the reasoning set out therein. In that case this court determined that relief is available to petitioners where there has been a "grave miscarriage of

justice.", Beggarly, 524 U.S. at 46.

The miscarriage of justice in this case is that the conduct of the First Constitution Bank, the FDIC and Republic Credit all combined to deprive the defendants of due process of the law.

Viewed in isolation each complained of action of First Constitution, of the FDIC, and of Republic is unsavory and improper. Each complained of action chopped away at the defendants' rights under the law. Each complained of action contributed to the damage caused to them.

When viewed all together the actions, which are still occurring, show a clear, unmistakable and distinct pattern of conduct designed to abrogate the defendants' rights and take their property without due process of the law.

The issues raised at the second trial of this case went to whether or not actions of First Constitution Bank had prevented the defendants from paying this loan. The uncontradicted evidence was that such actions had done so.

Issues were raised as to whether certain bank documents showed the loan was current at the time the initial foreclosure action was brought. The testimony of a bank official, as recited

before, was contradictory from one trial to the next.

The actions of the FDIC affected the amount of the judgment granted in this case.

The FDIC has procedure manuals identifying how and in what circumstances property can be transferred to other persons. Those procedures were ignored.

In this case you have a mistake by the bank, a cover up by the bank, a cover up of the cover up by the FDIC. You have officials of the bank and the FDIC making grave and significant misrepresentations to the court. You have a sale of assets by the FDIC done at time when they were not supposed to, a sale by the FDIC without a public auction and at what appears to be essentially a give away of the assets, and you have a sale done improperly according to the FDIC's own rules, and a sale done using an invalid power of attorney.

The power of the courts to address fraud is well established. Hazel-Atlas Glass Co. v. Hartford-Empire, 232 U.S. 238 (1944) stands for the proposition that equitable relief against fraudulent judgments is a judicially created remedy fashioned to relieve hardships which, from time to time, arise from a hard

and fast adherence to another court made rule. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations and to accord all the relief necessary to correct the particular injustices which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations. See Hazel-Atlas Glass, supra..

When a claim of fraud upon the court is raised the court has the inherent ability to hear arguments on such. Procedural due process is intended to protect individuals from government acts. It is intended to secure the individual from the arbitrary exercise of the powers of the government. See Albright v. Oliver, 510 U.S. 266 (1994). The Caldrellos as individuals should therefore be protected from predatory acts of the FDIC, an arm of the government. To date they have not been afforded that protection.

The defendants certainly did not get the benefit of due process when the trial judge ignored testimony that they had been unable to pay the loan due to actions of the First

Constitution Bank. This equitable claim is quite similar to that raised in Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227 (1937) in which the court found that the plaintiff had prevented the defendant from paying an insurance company policy premium and therefore could not take advantage of the defendant's failure to pay the premium. The defendants presented evidence of scienter on the part of the plaintiff. The defendants produced evidence that the plaintiff ignored and disregarded facts thus misleading the court. See Sunstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir. 1977). This amounts to scienter.

Scienter in this case is also found in the transfer of the property by the FDIC to Republic. This transfer was clearly an attempt on the part of the FDIC to avoid the defenses asserted by the Caldrellos, was done improperly and unlawfully. The transfer was for essentially no consideration and in fact Republic got the right to a potential $366,000.00 in addition to the property, subject of the foreclosure. As security instruments the transfer of these instruments are subject to the provisions of the Securities Act of 1933, and the Securities

Exchange Act of 1934. By doing these improper acts the FDIC violated those acts and committed acts of scienter. See Aaron v. SEC, 446 U.S. 680 (1980). See also Rubin v. United States, 449 U.S. 424 (1981).

The plaintiffs and/or their predecessors in interest have engaged in a continuing course of conduct which has deprived them of their property without an opportunity to be heard by a jury. Such opportunity is an essential requirement under the law and the defendants have not received it. See Fuentes v. Shevin, 407 U.S. 67 (1972) and Mullane v. Central Hanover Trust, Co., 339 U.S. 306. See also Baltimore & Caroline Line v. Redman, 295 U.S. 654 (1935) in which this court reiterated parties right to a jury trial.

One claim that the plaintiffs will make is that none of the acts complained of above were deliberate. The defendants would certainly disagree with such claim. However, it is immaterial. Under 28 USC 1346(b), the government is responsible for negligent acts of its agents, servants and/or employees. See Indian Towing Co. v. U.S., 350 U.S. 61 (1955). The violation of a mandatory regulation, such as the

FDIC internal regulations and procedures alluded to, open up the United States to liability under the act. See U.S. v. Gaubert, 495 U.S. 315 (1951).

The defendants have also suffered a deprivation of their rights under the 4th amendment. As a result of the what has happened their property has been effectively seized. This is improper under the law. See Soldal v. Cook County, 506 U.S. 121 (1992), U.S. v. Jacoby, 466 U.S. 109 (1984) and Katz v. U.S., 389 U.S. 347 (1967).

In anticipation of one of the plaintiff's likely positions, that is, that some of what is complained of, i.e. the bank losing the check, etc. is res judicata, the defendants' response is that there was never a trial on the merits of the allegations. The matter was disposed of at the federal court on a motion for summary judgment on standing and statute of limitations grounds. Again, there was never a trial on the merits.

CONCLUSION

The FDIC, Republic and First Constitution Bank engaged in a long series of actions both before and after the second trial of this matter. Although disturbing in isolation the acts as a whole

are repugnant. These actions deprived the Caldrellos of their property without the due process of the law. The Connecticut courts have failed to recognize this and have thus committed reversible error.

It is important in this case to remember that Justice Marshall said that whenever a man brings a dispute about his property this court should hear it and decide it pursuant to the precepts of Article 3, Section 2, Clause 1 of the Constitution.

Therefore, for all of the reasons recited above, it is respectfully submitted that the defendants, Joseph and Sandra Caldrello, were deprived of their rights under the law, specifically under the 4th, 5th, 7th and 14th amendments, that as a result they are entitled to a jury trial on the merits of the case and on the events that have transpired since this matter was tried, and that thus this petition of certiorari should be granted.

RESPECTFULLY SUBMITTED

THE PETITIONERS
SANDRA CALDRELLO
JOSEPH CALDRELLO

By _____

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FEDERAL DEPOSIT INSURANCE CORPORATION AND REPUBLIC CREDIT CORPORATION, I

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Court Decision A14-A35

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF FIRST CONSTITUTION BANK *v.* JOSEPH M. CALDRELLO ET AL.

The petition for certification by the defendants Joseph M. Caldrello and Sandra V. Caldrello for appeal from the Appellate Court, 68 Conn. App. 68 (AC 20144), is denied.

Richard D. Haviland, in support of the petition.

Donald E. Frechette, in opposition.

Decided March 14, 2002

ANDRE EVANS *v.* COMMISSIONER OF CORRECTION

The petitioner Andre Evans' petition for certification for appeal from the Appellate Court, 68 Conn. App. 903 (AC 22034), is denied.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF FIRST CONSTITUTION BANK *v.* JOSEPH M. CALDRELLO ET AL.
(AC 20144)

Foti, Flynn and O'Connell, Js.

Syllabus

The defendant property owners, J and S, appealed to this court from the judgment of the trial in favor of the plaintiff receiver of a failed bank ordering strict foreclosure of certain of their real property. *Held:*

1. Contrary to the claim made by J and S, the trial court properly granted the plaintiff's motion to open a judgment of nonsuit that had been rendered when the plaintiff failed to appear for a pretrial conference; the evidence presented supported that court's determination that the plaintiff had not received proper notice of the nonsuit and that it had filed the motion to open within four months of learning of the nonsuit.
2. The trial court did not abuse its discretion in denying J and S's motion in limine to prevent the plaintiff from presenting certain newly disclosed evidence and testimony, the plaintiff having explained that the challenged evidence was merely supportive of evidence previously disclosed and J and S having been offered a continuance to allow them to review the documents.
3. The trial court properly declined to grant equitable relief to J and S on their claim that they had sustained certain business losses as a result of the plaintiff's allegedly negligent handling of a certain check, that court having found that that claim was collateral to the mortgage foreclosure, that there was no evidence that the mortgage itself was unusual or unconscionable, that although the mortgage obligation was personal, the claimed losses were corporate and that the claim had been resolved in favor of the plaintiff in an action in federal court.

Argued November 29, 2001—officially released January 25, 2002*

Procedural History

Action to foreclose a mortgage on certain real property, brought to the Superior Court in the judicial district of New London, where the court, *Hendel, J.*, rendered a judgment of nonsuit; thereafter, the court granted the plaintiff's motion to open the judgment; subsequently, the matter was tried to the court, *Hon.*

* January 25, 2002, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Joseph J. Purtill, judge trial referee; judgment of strict foreclosure, from which the named defendant et al. appealed to this court. *Affirmed.*

Richard D. Haviland, for the appellants (named defendant et al.).

Donald E. Frechette, with whom was *Joshua L. Milrad*, for the appellee (plaintiff).

Opinion

FOTI, J. The defendants Joseph M. Caldrello and Sandra V. Caldrello[1] appeal from the trial court's judgment of strict foreclosure. On appeal, the defendants argue that the court improperly (1) opened the judgment of nonsuit more than twenty months after it had been rendered, (2) allowed the plaintiff, the Federal Deposit Insurance Corporation (FDIC), to introduce certain evidence and the testimony of a witness, which had not been disclosed to the defendants until the eve of trial, and (3) failed to adjust the verdict for the undisputed unclean hands of the FDIC. We affirm the judgment of the trial court.

The following facts are undisputed. On November 22, 1988, the defendants executed a mortgage and note to First Constitution Bank (bank) in the amount of $2.2 million. In September, 1989, the bank commenced an action to foreclose the mortgage. The defendants filed an answer and counterclaim, denying that the note was in default and claiming an improper setoff by the bank against certain certificates of deposit owned by the defendants. On September 8, 1992, the court rendered a judgment of strict foreclosure in favor of the bank and against the defendants on the complaint and counterclaim. On October 2, 1992, the bank was declared

[1] Several subsequent encumbrancers were named as defendants but are not involved in this appeal. We refer in this opinion to the Caldrellos as the defendants.

insolvent, and the FDIC was appointed as receiver. By decision released April 11, 1995, this court reversed the judgment of strict foreclosure and remanded the case for a new trial. *First Constitution Bank* v. *Caldrello*, 37 Conn. App. 529, 656 A.2d 1053 (1995).

On June 23, 1995, a judgment of nonsuit was rendered against the FDIC for failure to appear at a pretrial conference. On January 21, 1997, the FDIC filed a motion to open the judgment of nonsuit, claiming, inter alia, that it never received notice of the pretrial conference. Following a hearing, the court granted the motion over the defendants' objection. The court subsequently rendered a judgment of strict foreclosure. The defendants then filed the present appeal.[2]

I

The defendants first argue that the court lacked the authority to open the judgment of nonsuit more than twenty months after it had been rendered.[3] The defendants contend that the court found that the FDIC had received notice and, therefore, improperly granted the motion to open. We disagree.

General Statutes § 52-212 provides in relevant part that "[a]ny judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set

[2] On September 11, 2000, this court ordered that Republic Credit Corporation be permitted to intervene as an appellee in this appeal. This court further ordered that the FDIC remain a party in the case. On September 27, 2000, this court remanded this case to the trial court for a hearing to consider the effect of the FDIC's purchase of the subject properties at a tax sale, and whether the mortgage being foreclosed was extinguished by the tax sale. On July 18, 2001, the trial court filed its memorandum of decision in which it concluded that the mortgage being foreclosed was not extinguished and is still viable.

[3] The defendants specifically argue that the court had no jurisdiction to open the judgment of nonsuit. The defendants' claim, however, challenges the court's general statutory authority to grant relief, not the court's jurisdiction. See *Kim* v. *Magnotta*, 249 Conn. 94, 102–103, 733 A.2d 809 (1999); *Opoku* v. *Grant*, 63 Conn. App. 686, 689–90 n.2, 778 A.2d 981 (2001).

aside, within four months following the date on which it was rendered or passed . . . upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense."

"[I]t is axiomatic that the right to move to open and vacate a judgment assumes that the party who is to exercise the right be given the opportunity to know that there is a judgment to open." (Internal quotation marks omitted.) *Habura* v. *Kochanowicz*, 40 Conn. App. 590, 593, 672 A.2d 512 (1996). "In *Habura* v. *Kochanowicz*, [supra, 592], this court stated: 'Where the defendants have not *received* notice of the default judgment . . . the time within which they may move to set aside the judgment is extended by the delay in notification.' " (Emphasis in original.) *Tyler E. Lyman, Inc.* v. *Lodrini*, 63 Conn. App. 739, 746–47, 780 A.2d 932, cert. denied, 258 Conn. 902, 782 A.2d 137 (2001). The FDIC argues, and we agree, that the court was presented with sufficient evidence demonstrating that it did not receive notice of the entry of the nonsuit in a timely manner and that it filed its motion to open within four months of receiving notice.

The nonsuit was rendered against the FDIC on June 23, 1995, based on the failure of the FDIC to attend a pretrial conference scheduled for June 15, 1995. On January 21, 1997, the FDIC filed a motion to open the judgment of nonsuit. On March 10, 1997, the FDIC filed a brief in support of its motion. Attached to this brief was the affidavit of Penny Seaman, an attorney who represented the bank from the commencement of the action until after the initial judgment of strict foreclo-

sure on September 8, 1992. Seaman stated in this affidavit that after the FDIC was named receiver of the bank on October 2, 1992, the FDIC obtained other counsel and that she requested permission to withdraw as counsel for the bank. Seaman further stated that she had received no communication from the Superior Court since the defendants filed their initial appeal with the Appellate Court, and that she did not learn that the case had been remanded by this court until February 24, 1997, when she received a telephone call from counsel for the FDIC. Seaman specifically stated that she never received notice of the pretrial conference scheduled for June 23, 1995,[4] or copies of any pleadings that might have been filed in the case since notification of the appeal. Seaman stated that it is her practice to notify new counsel of any pleadings or notices that she receives in connection with a case transferred to the FDIC, and that if she had received notice of a pretrial conference or motions filed by the defendants, she would have notified counsel for the FDIC.

The FDIC also attached the affidavit of attorney Gale Kosto to the brief in support of its motion to open. Kosto attested that she had represented the FDIC as receiver from January 4, 1993, until April 11, 1995, in the appeal to this court and continued to represent the FDIC in this matter. This affidavit stated in pertinent part that she "had no notice of the assignment of pretrial, no notice of the entry of a nonsuit, and no notice of a motion to transfer, written or oral, from the Court or anyone else, until January, 1997." In this affidavit, Kosto recounted her dealings with counsel for the defendants and how she had learned of the nonsuit in January, 1997, from an attorney representing the FDIC

[4] The nonsuit was rendered on June 23, 1995. The pretrial was scheduled for June 15, 1995.

in a federal district court action.[5] The FDIC further attached a letter from Kosto to counsel for the defendants dated September 15, 1995, suggesting that they schedule a conference call with the Superior Court caseflow coordinator in New London to move the case along.[6] The FDIC further attached a letter from counsel

[5] The affidavit provides in relevant part as follows:

"7. In April, 1995, shortly after the publication of the opinion reversing and remanding this mater for a new trial, I called [attorney] Haviland to discuss plans for the new trial. . . . We discussed when the new trial might begin. Haviland said he thought the Court would calendar it in due time. He told me he was very busy.

"8. On September 15, 1995, having heard nothing from the Court or from anyone else about the new trial, I called the Clerk's office in Superior Court in New London to inquire about the Caldrello case, telling the person who answered the phone that it had been remanded for a new trial. She told me that the case must have 'fallen through the cracks.'

"9. I immediately called Attorney Haviland, left a message, and then, later in the day, hearing nothing from him, sent him the letter . . . dated September 15, 1995, in which I suggested that we make a conference call to Leslie Steiner, the Case Flow Coordinator, to see if we could move the case along.

"10. In the same mail, I sent an Appearance to the Superior Court.

"11. I heard nothing from the Court and nothing from Attorney Haviland.

"12. I first heard about the entry of a nonsuit in this foreclosure action from an attorney who represents the FDIC in the District Court action sometime toward the end of the first week in January, 1997. Attorney Douglas Poulin called to tell me that in the course of a telephonic pretrial conference in the case, now on appeal to the Second Circuit, after a judgment in favor of the FDIC, Mr. Caldrello mentioned that the FDIC had been defaulted in the foreclosure action.

"13. I immediately called the Court, only to learn that the file could not be located. I then called Haviland to ask him [what] had happened. He told me that the 'default' had entered sometime between the time the case was remanded and September 15. Upon file review, he reported that he believed notice came to him only by word of mouth, not from the Court. . . .

"14. I asked Haviland if he had made any attempt to notify me when he heard of the pretrial. He replied that he had been under no obligation to do so. He said that someone at the FDIC must have gotten notice, and if the FDIC failed to notify its counsel, that was not his problem.

"15. I asked Haviland whether he believed that as a matter of professional courtesy and candor he should have at the very least responded to my September [15] 1995 letter to tell me that a nonsuit had entered sometime earlier. My note reflects his answer: 'Apparently not.'"

[6] We note that this letter, dated September 15, 1995, was sent to opposing counsel within four months of the entry of the nonsuit.

for the defendants dated January 13, 1997, stating that he had reviewed his file and could not find any documentation regarding the default.[7] Finally, the FDIC attached the affidavit of attorney Ivan Rivera, FDIC's in-house counsel assigned to supervise this case. Rivera stated in the affidavit that he searched the FDIC's files and found no documentary evidence or notice of any kind to show that the FDIC had been notified of a pretrial conference on June 23, 1995, or any other date.

Following oral argument, the court granted the FDIC's motion to open.[8] We conclude that the evidence submitted in support of the motion to open supports the conclusion that the FDIC did not receive notice of the nonsuit and that it timely filed its motion to open within four months of learning of the nonsuit.[9] The court, therefore, had the authority and properly granted the motion to open the judgment of nonsuit. Id., 747–48; *Habura* v. *Kochanowicz*, supra, 40 Conn. App. 592–93.

II

The defendants next argue that the court improperly allowed the FDIC to introduce certain evidence and the

[7] The letter states in relevant part: "I have reviewed my file on this matter and I do not find any documentation regarding the default. My best recollection of what happened is that shortly after the foreclosure was remanded back to the trial court a pretrial was scheduled. I did not initially receive notice of that but found out somehow. I attended the pretrial and counsel for the FDIC did not appear, despite having been notified. I recall that your office was not notified, but someone did receive notice on behalf of the FDIC. At that time, Judge Hendel (I think) ordered a default against the FDIC."

[8] The motion was granted on the condition that the defendants be given ninety days to complete discovery, with no extension unless granted by the court.

[9] In so holding, we acknowledge the defendants' argument that the trial court specifically found that the FDIC had received notice. As the FDIC correctly points out, however, the defendants cite to portions of the transcript regarding notice of the pretrial conference, not notice of the nonsuit. A review of the transcript of the motion to open reveals that the court made no factual findings regarding whether the FDIC received notice of the nonsuit, and the defendants failed to request an articulation on this issue. See *Riggio* v. *Orkin Exterminating Co.*, 58 Conn. App. 309, 313, 753 A.2d 423, cert. denied, 254 Conn. 917, 759 A.2d 507 (2000).

testimony of a witness, which had not been disclosed to the defendants until the eve of trial. The FDIC counters that the court did not abuse its discretion in admitting evidence and testimony relating to certain records of the bank. We agree with the FDIC.

The following additional facts are necessary to our resolution of this claim. The contested evidence involved certain reductions in the defendants' loan balance. The defendants claimed at trial that payments had been made on the loan, resulting in the reduction in the balance. The FDIC countered that the reductions in the loan balance did not reflect payments, but were actually internal "write-downs," a practice used by the bank when the mortgage balance was not equal to the value of the mortgaged property.

The defendants filed a motion in limine dated April 27, 1999, arguing that certain documents that they received from the FDIC on April 15, 1999, regarding the loan balance should not be admitted into evidence. The defendants claimed that the trial was scheduled for April 27, 1999, and that disclosure of the documents at this late date amounted to "trial by ambush." During oral argument on the motion, counsel for the defendants argued that counsel for the FDIC had been in possession of the documents for almost one year and had not turned them over to him.

Counsel for the FDIC responded that the defendants had suffered no prejudice because the documents in question, certain debit and credit tickets, were backup documentation to five bank documents that had been supplied to the defendants prior to the May, 1998 trial date.[10] Counsel for the FDIC further stated that the individual who prepared the documents was present at trial and that counsel for the defendants would have

[10] It is undisputed that the case originally had been scheduled for retrial in May, 1998, but did not go forward at that time.

a full opportunity for cross-examination.[11] The court inquired of counsel for the defendants whether a continuance would be helpful to examine the documents, and counsel responded that it would not.[12] The court denied the motion in limine and allowed the introduction of the evidence.

"As a threshold matter, we set forth the standard by which we review the trial court's determinations concerning the admissibility of evidence. A trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and . . . evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing

[11] Counsel for the FDIC argued in relevant part: "The witness who is here to identify those documents is the person who prepared them, and Mr. Haviland will have an opportunity to cross-examine her to whatever extent he feels necessary to make sure that he understands these documents. There was no . . . intention whatsoever to conceal these from him. He already knew that we considered five entries charge-offs. He already knew that there was documentation from the bank, which he had seen, which referenced these charge-offs, and now we simply have more supporting documents."

[12] Counsel for the defendants argues that a continuance was discussed as a possibility, but was never actually offered to the defendants. The transcript reveals the following colloquy:

"The Court: Mr. Haviland, would it be of any benefit to you if this hearing were postponed so that you can have a further opportunity to examine these documents and prepare for cross-examination?

"[Attorney Richard Haviland]: Your Honor, quite frankly it probably wouldn't, but again this goes—this goes to the pattern here in the federal case of what's happening in discovery. We get it as a, you know—we get it basically as the FDIC decides we should get it.

"If this trial was scheduled for this time this spring, early, you know, beginning of February, if I had gotten it then, I wouldn't be objecting to it, but, you know—you know, there has to be an ending point to the production of documents as they see fit, and I don't think a continuance would do me any benefit in terms of this. But I think that at some point you have to say enough is enough."

by the defendant of a substantial prejudice or injustice." (Internal quotation marks omitted.) *Hayes* v. *Decker*, 66 Conn. App. 293, 298, 784 A.2d 417 (2001).

The defendants argue that they suffered substantial prejudice and that the court abused its discretion in admitting these documents and permitting the witness to testify. The defendants first contend that, in the absence of the witness and documents, the FDIC would have had a more difficult time proving its case as to the issue of write-downs and, second, that the late disclosure prevented the defendants from having an expert witness examine the documents and comment on them. On the basis of our review of the record, we conclude that these reasons are insufficient to show an abuse of discretion by the court or that the defendants suffered prejudice by the introduction of this evidence. The court heard argument that this evidence was merely supporting documentation of evidence previously disclosed to the defendants. Because the defendants already had notice of the FDIC's position that the five reductions in the loan balance were internal write-downs, the introduction of this evidence cannot be considered "trial by ambush." Furthermore, when questioned by the court, counsel for the defendants indicated that a continuance to review the documentation would not be helpful. Under these circumstances, we cannot say that the court abused its discretion in denying the defendants' motion in limine and allowing the FDIC to present the challenged evidence.

III

The defendants' final claim is that the court improperly failed to adjust the verdict for the undisputed unclean hands of the FDIC. We disagree and conclude that the court properly declined to grant equitable relief to the defendants.

According to the defendants, it is undisputed that the bank lost a $300,000 check for a period of time, and then denied losing it, as did its successor, the FDIC. The defendants argue that as a result, checks written on Joseph Caldrello's business accounts bounced. The defendants contend that the bank did not give the persons to whom such checks had been written an explanation for the apparent lack of funds in the account and that as a direct result of the actions of the bank, they were unable to fulfill their obligations to the bank in paying the mortgage.

The court found, and we agree, that these claims were not properly before the court. The defendants' original counterclaim, dated November 7, 1989, contained no such allegations, and, in November, 1991, the court denied the defendants' request to amend the counterclaim to add such claims. The defendants did not challenge this ruling in their initial appeal to this court. *First Constitution Bank* v. *Caldrello*, supra, 37 Conn. App. 529.

Although that issue was not properly before the court, the court acknowledged that it had discretion, on equitable considerations and principles, to withhold foreclosure or reduce the amount of the stated indebtedness. *Hamm* v. *Taylor*, 180 Conn. 491, 497, 429 A.2d 946 (1980). The court, citing *Hamm*, further stated that it had the authority to extend the proceedings to enable the FDIC to respond to these claims. The court, however, held that, for several reasons, such action was not warranted in this case.

As the court properly found, the claims raised by the defendants are collateral to the mortgage foreclosure itself. The allegations involve conduct on the part of the bank that arguably caused damage to the defendants and reduced their ability to pay the mortgage. As the court held, however, there was no evidence that the

mortgage itself was unusual or unconscionable. Furthermore, the court found that, although the defendants entered into this transaction as individuals mortgaging residential real property, the alleged losses claimed were business losses suffered by the defendants' corporation. Finally, the court noted that these claims had been raised in a federal district court action, which was resolved in favor of the FDIC. *Caldrello* v. *Federal Deposit Insurance Corp.*, United States District Court, Docket No. 3:93CV1560(AHN) (D. Conn. June 25, 1996). We conclude, on the basis of these facts, that the court properly declined to grant equitable relief to the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

JUDY SANDVIG ET AL. *v.* A. DUBREUIL AND SONS, INC., ET AL.
(AC 20723)

Schaller, Mihalakos and O'Connell, Js.

Syllabus

The plaintiffs, J and K, sought to recover for personal injuries sustained by J in a fall that allegedly was caused by the negligent installation by the defendant contractor, D Co., of a ramp for handicapped access in the school where J worked. D Co.'s work was performed in 1989, and J fell on September 26, 1991. On February 23, 1993, D Co. filed a petition for bankruptcy for which an automatic stay issued. The plaintiffs' writ of summons and complaint were dated and served during the time that the stay was in effect. The plaintiffs' 1997 requests to amend the complaint were denied by the trial court, and, on March 29, 2000, that court rendered summary judgment in favor of D Co. On the plaintiffs' appeal to this court, *held*:

1. The trial court properly determined that the plaintiffs' proposed amendment to their negligence claim, which alleged that D Co. actively damaged floor tiles in the area of the ramp, did not relate back to the original complaint, which alleged that the defendant failed to repair already damaged or exposed tiles, and the amendment therefore was time barred.

NO. 511581

FDIC AS RECEIVER FOR FIRST CONSTITUTION BANK	:SUPERIOR COURT
VS.	:NEW LONDON :JUDICIAL DISTRICT :AT NEW LONDON
JOSEPH M. CALDRELLO, ET AL	:OCTOBER 7, 1999

MEMORANDUM OF DECISION

This is a contested action to foreclose a mortgage claimed to be in default. The basic facts are not greatly in dispute and are found to be as follows:

In 1988, defendant Joseph M. Caldrello was a businessman with a number of automobile dealerships in Connecticut and elsewhere. On November 22, 1988, Mr. Caldrello and his wife defendant Sandra V. Caldrello executed a mortgage and note to First Constitution Bank (hereinafter the Bank) in the amount of $2,200,000.00. The mortgagee pledged contiguous real property described as 929 Pequot Avenue, 939 Pequot Avenue, Lots 3, 4, 5, 6, 7, and 8, all in the City of New London. Interest was adjustable with the initial

rate being 8.500 percent. The monthly payment, including escrow, was in the amount of $17,696.09 with the first payment due January 1, 1989.

Claiming the mortgage to be in default, First Constitution Bank commenced a foreclosure action by writ, summons and complaint dated July 31, 1989, served on defendants on August 9, 1989 and filed on August 23, 1989, with a return date of September 19, 1989. The defendants in the action were the Caldrellos (hereinafter referred to as the defendants) and others.[1]

In response to a motion by plaintiff, on November 19, 1989, defendants disclosed that they had a bona fide defense to the foreclosure action. The nature of the defense was that a right of set off executed by First Constitution Bank had sufficient funds in certificates of deposit held by the bank to pay any defaulted payment. On the same date, defendants filed

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See First Constitution Bank vs. Caldrello, et al, 37 Conn. App. 529, 530, n.1 (1995).

a counterclaim claiming an improper exercise of right of set off. Defendants sought to amend the counterclaim on November 6, 1991, but the amendment was denied (Hendel, J.).

The matter came to trial and on September 8, 1992, a judgment of strict foreclosure was rendered in favor of the plaintiff bank and against defendants on the complaint and on the counterclaim. (Hurley, J.) This judgment was reversed and a new trial ordered by the Appellate Court. First Constitution Bank v. Caldrello, et al, 37 Conn. App., supra 529.

On October 2, 1992, the Commissioner of Banking of the State of Connecticut declared First Constitution Bank unsafe and closed the bank. The Federal Deposit Insurance Corporation (hereinafter FDIC) acquired the assets and liabilities of the bank and was appointed receiver. At the commencement of the second trial, FDIC was substituted as plaintiff. "The FDIC has the power as receiver to foreclose on

the property of the debtor." Lloyd v. FDIC, 22 f.3d 335 (1st Cir. 1994), citing 12 U.S.C. § 1821(d)(2)(B)(ii).

Although it does not appear to have any effect on the issues now before this court, it is noted from the file that in July, 1998 FDIC purchased the mortgaged property at a tax sale held by the City of New London. Subsequently, the parties stipulated the FDIC would not dispose of the property prior to trial.

I.

The first issue, which the court must decide is whether plaintiff has proven that the mortgage was in default at the time was brought in 1989 and whether it was in default at the time of trial.

The principal evidence in support of FDIC's claim that the mortgage was in default consisted of three documents and the testimony explaining the documents.

The first document was the Bank's "Mortgage Loan Customer Record Report." This was a three-page

computerized report designed to show the history of defendants' mortgage loan. The second document was a similar report entitled "Mortgage Loan Transaction History." The third document contained the "Mortgage Transaction Codes." The information on these documents was explained by Maureen Villani, a former officer of the Bank who had daily contact with the records and was involved with the defendants' mortgage.

The evidence shows that defendants made payments in the amount of $17, 696.09 on January 5, 1989 and February 17, 1989. A check in this amount was presented on April 5, 1989, and a triple payment of the same amount on May 31, 1989. These payments, however, were reversed and no funds were actually received by the Bank. The evidence is clear that the last payment made by the defendants on this mortgage was made on February 17, 1989. Defendants do not dispute this.

With no valid payments having been made since February 17, 1989, the mortgage was in default with a

principal balance of $2,193,244.42 due on August 11, 1989. On that date, the bank exercised its right of set off and used pledged certificates of deposit to credit defendants' loan account with four payments of $17, 696.09. These were the last payments made on the mortgage. According to the terms of the mortgage note, defendants were obligated to make monthly payments commencing January 1, 1989. The evidence is clear that they had not honored their obligation. They made two payments and were credited with four payments resulting from the set off.

It must be concluded that the mortgage note was not being paid according to its terms, was current only through June 1, 1989, and was in default when this action was commenced on August 23, 1989.

Defendants dispute that the FDIC has proven that the mortgage was in default at the time this action was instituted. They also dispute that it has been proven that it was in default at the time of trial. It is defendants' principal argument in this

regard that the "Mortgage Loan Customer Record Report," the Mortgage Loan Transaction History" and the "Mortgage Transaction Codes" admitted into evidence are highly suspect and, if anything, show an active mortgage not in default.

The first two documents were computer generated and there as testimony that the Bank's computer system was not as sophisticated as it could have been. The testimony of Ms. Villani and Timothy Doheny, a loan officer at the Bank who handled defendants' account, was necessary for an understanding of the documents and how from time to time they reflect the status of the mortgage loan. It is also noted that these exhibits were considered by the Bank to be "in house" working documents to be used by Bank personnel to reflect the economic health of the institution.

It is defendants' position that the documents reflect a number of substantial credits in their favor which appear to show the loan s active with the balance being reduced.

Testimony concerning these entries indicates that the

Bank was highly regulated by FDIC and the Connecticut Banking Department. These agencies required that the Bank submit reports showing its true net worth. To comply with these requirements a committee of the Bank would meet from time to tome to consider the value of mortgages as assets of the Bank. In situations where the mortgage balance was not equal to the value of the mortgaged property the committee would order a "write down." Ms. Villani would cause the amount of the "write down" to be entered on the documents in evidence. This would result in a reduction in principal on the documents. The purpose of this entry was only to reflect the value of the assets held by the Bank and was not intended as credits to reduce the amount of defendants' loan.

The way in which the Bank's computer system reflected these reductions in mortgage value is the source of the apparent confusion which defendants rely on.

An illustration of the problem is an entry on the Mortgage Loan Transaction History dated March 19, 1990.

This entry indicates a mortgage transaction Code 32. "Principal credit" of $400,000 applied against principal only. Defendants even received a computer generated statement of mortgage account dated December 31, 1990, indicating "Principal Paid During Year" $400,000.00 and an escrow payment of $23.71 with an escrow balance of $2,637.23.

The $400,000.00 was never paid by defendants or anyone else on their behalf. The better evidence leads to the conclusion that on March 15, 1990, the Bank committee which reviewed the bank assets met to consider the value of a number of mortgages, including defendants' mortgage. It was voted to reduce the value of a number of these mortgages and the value of the defendants' mortgage was reduced by $400,000.00 as a result of the vote. Ms. Villani, a member of the committee, prepared a Miscellaneous Monetary Mortgage Loan form reflecting the reduction of $400,000.00 with a Code 32. This information was entered on the Mortgage Loan Transaction History on March 19, 1990. A cursory examination of this

document might lead one to believe that on that date someone paid $400,000.00 to reduce the mortgage principal, but the evidence indicates that it did not happen.

Defendants dispute the validity of the three documents principally relied upon by FDIC to prove that the mortgage was, and is, in default. They claim that this evidence is not worthy of belief and that FDIC has not sustained its burden of proof on this essential allegation.

One contention of defendants is that the interpretation of the language used in the documents by the witness to show default is contrary to the plain English understanding of the words. For example, defendants argue that the words "paid" and "balance" should indicate the amount paid on the mortgage and the balance remaining. Another illustration of the language problem is apparent in connection with the March 19, 1990 transaction involving the $400,000 write downs. Ms. Villani assigned a Code 32 designation to this transaction. According to the code in evidence, 32 indicates "principal credit." This

would seem to indicate a payment on principal in that amount. As previously noted, however, no such payment was made on the principal owed.

There is no doubt that the language used by the Bank could have been more exact, but the documents were primarily intended for internal use and the testimony of the witnesses is logical and explanatory.

It is also argued that certain communications from the Bank to the defendants were inconsistent with the mortgage being in default. One of these items is a form letter dated May 31, 1989, thanking Mr. Caldrello for "banking with us." In January, 1991, the defendants were sent a form reminder to keep their property insured, and on at least two occasions after the start of the foreclosure, payments books were sent to defendants. FDIC also informed defendants of a change of address in 1998.

Standing alone, these documents might appear to be inconsistent with a mortgage in default. Placed in the context

of the great weight of the evidence to the contrary, however, this interpretation cannot stand. At best, the communications might show poor management on the part of the Bank and the FDIC with one hand not knowing what the other was doing. More likely, they fall into the category of junk mail with little evidentiary value.

Defendants also argue that FDIC's nonproduction of certain documents, such as minutes of the Bank directors' meeting and samples of customer record reports and transaction histories, raises an inference that the documents relied upon by FDIC to prove its case are not accurate. Defendants also claim that the documents have been altered to support the foreclosure action.

A review of the 291 indexed court papers which make up the file in this case fails to reveal any motion to compel production of the documents requested. The file does contain a "Request for Hearing Re: Discovery" filed on January 29, 1998, but there is no indication of further action on the request

or of any judicial action determining its merits.

Considering all of the evidence relative to the three exhibits, it cannot be found that they have been altered. Discrepancies do exist with respect to the exhibits and FDIC's claim, but considering all of the evidence, it is found that the exhibits are worthy of belief and that FDIC has sustained its burden of proof that the mortgage was in default at the time the action was started and that it has remained in default.

II.

On November 24, 1997, defendants filed a three-count counterclaim. The thrust of the counterclaim is that the right of set off exercised by the Bank on August 8, 1989, was improper under the law and that as a result defendant had suffered damages.

At trial, no evidence was introduced in support of the counterclaim and defendants have not addressed it in their brief.

This issue was raised in a case brought by defendants in

the Federal District Court (Joseph M. Caldrello, et al v. FDIC, et al, No. 3:93CV-1560(AHN) (D. Conn. June 25, 1996). The Federal District Court resolved the issue against the claim of improper set off. The United State Court of Appeals for the Second Circuit approved the District Court's decision by summary order filed August 21, 1997.

It must then be found that defendants have failed to prove the allegations of the counterclaim.

III.

On November 6, 1991, almost two years after the start of the foreclosure action, defendants moved to amend the counterclaim by adding three additional counts. These counts allege malfeasance on the part of the Bank in improperly crediting deposits made by defendant Joseph M. Caldrello in December, 1988. The motion to amend the counterclaim was denied on November 6, 1991 (Hendel, J.) and is therefore not properly before the court.

The allegations, which defendants sought to introduce

in this action by the amendment, were directly raised in the federal action above noted. The allegations were important because as Magistrate Judge Egan stated in his Recommended Ruling for Summary Judgment against these defendants, "It is alleged that the failure to credit deposits made to the right accounts caused checks written by the business (car dealerships) to be dishonored by creditors. These acts are alleged to be the cause of the financial downfall of Mr. Caldrello's business."

Although not included in the allegations, the original counterclaim, or the counterclaim which they attempted to file, defendants also maintain a claim based upon an escrow agreement mishandled by the Bank. This claim also has not been pleaded and is not properly before this court.

Although these issues were not properly before the court, not being part of the pleadings, the trial court in a foreclosure proceeding has discretion, on equitable considerations and principles, to withhold foreclosure or to

reduce the amount of the stated indebtedness. Connecticut Bank & Trust Co. v. Katske, 40 Conn. Supp. 560, 563 (1986). This would require the court to analyze the case to determine whether the Bank or the FDIC's conduct was no unconscionable that the court should withhold foreclosure under equitable principles.

Equitable power, however, must be exercised equitably. This would require that the equitable issues be properly raised in the pleadings and FDIC, being given an opportunity to make a factual response to the claims. Hamm v. Taylor, 180 Conn. 491 (1980). Since these issues have not been pleaded, it would be improper for the court to now withhold foreclosure.

Since we are dealing with equitable claims, however, the court would have authority to extend the proceedings, give parties an opportunity to respond and decide the issues. It does not appear that under the circumstances of this case that would be appropriate.

Under the circumstances of this case, such action is not

warranted for a number of reasons.

The equitable claims which defendants attempt to raise are, in fact, collateral to the mortgage foreclosure. In Hamm v. Taylor, supra, 180 Conn. 495, a case involving equity with respect to the mortgage interest rate, the Supreme Court stated that General Statutes § 42a-2-302 "although addressed primarily to contract for the sale of goods, furnishes a useful guide." This statute deals with situations where the court finds as a matter of law that a contract or any cause of the contract is unconscionable.

The claim here is that the Bank engaged in certain conduct and caused damage to the defendants, by inference, reduced their ability to pay the mortgage. There is, however, no evidence that the mortgage transaction itself was unusual or unconscionable.

Also, the defendants entered into the mortgage as individuals mortgaging residential property. The losses suffered as a result of the claimed misconduct on the part of

the Bank were business losses suffered by a corporation or corporations.

To enforce their claims against the Bank, a separate action would be more appropriate. This is what defendants attempted to do in the Federal Court action. As noted, in that action the issues were directly raised and all resolved against defendants.

With respect to defendants' claims that the Bank mishandled an escrow agreement, that document, or any copy of the document, does not appear to exist. It was not produced in this trial or in the federal action and there was no evidence of the Bank participation in the agreement. Enforcement of this claim against FDIC would be prohibited by the provisions of U.S. Code 12 § 1823(e)[2].

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U.S.C. 12 § 1823(e). No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement -

In their brief, defendants have made a number of claims that the conduct of the Bank and FDIC was such that the equitable powers of the court should be invoked to deny foreclosure of the mortgage. It was argued that the Bank was guilty of improprieties and altered documents. It was also argued that FDIC was guilty of similar conduct and purposefully withheld documents. Defendants argue, in effect, that in this equitable action, FDIC has not come into court with "clean hands." Pappas v. Pappas, 164 Conn. 242, 246 (1973).

In cannot be found, however, that any documents have

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1. is in writing,
2. was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor contemporaneously with the acquisition of the asset by the depository institution,
3. was approved by the board of directors of the depositor, institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
4. has been, continuously, from the time of its execution, an official record of the depository institution.

been altered or purposefully withheld or that such inequities were perpetrated against defendants so as to cause denial of the relief sought.

IV.

The mortgage, having been found in default, the Court is required to determine the balance due. John J. Murphy, a portfolio manager for FDIC having responsibility for defendants' mortgage, testified as to how he arrived at the balance claimed to be due. His testimony, together with other evidence, tends to confirm the amount of the debt. The debt is therefore found to be as follows:

Principal:	$2,193,336.31
Interest to	1,707,882.15
Total	$3,901,218.46

The per diem charge from April 26, 1999 is found to be $418.87.

In addition to principal and interest, FDIC has advanced $590,000.00 in payment of taxes to the City of New

London.

No finding is made as to attorney's fees, but the record indicates that the original judgment of September 8, 1992 found attorney's fees to be $68,804.92. Attorneys for plaintiff now claim fees in the amount of $31,427.52 exclusive of the appeal and the first trial.

From the evidence, the value of the real property secured by the Mortgage is found to be as follows:

929 Pequot Avenue	Land:	$100,000
New London, CT	Buildings:	$362,000
	Total:	$462,000
939 Pequot Avenue	Land:	$125,000
New London, CT	Buildings:	$110,000
	Total:	$235,000
Lots 3-8, Osprey Estate		$425,000
New London, CT		

Total value of real property, land and buildings is found to be $1,122,000.00.

Appraisal fees in the amount of $2,700.00 are approved.

Accordingly, judgment of strict foreclosure is entered

and law day is set for January 3, 2000.

Joseph J. Purtill
Judge Trial Referee

Supreme Court, U.S.
FILED
JUL 18 2002
CLERK

No. 01-1837

In The
Supreme Court Of The United States

JOSEPH CALDRELLO AND SANDRA CALDRELLO
Petitioners

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
AND REPUBLIC CREDIT CORPORATION, I
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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SUMMARY OF ARGUMENT

Petitioners, Joseph Caldrello and Sandra Caldrello ("Petitioners"), ask this Honorable Court to grant their Petition for Writ of Certiorari (the "Petition") and – and in so doing – to pass upon purported constitutional questions that were neither properly raised nor decided below. While it is difficult to determine the basis of Petitioners' constantly-changing arguments, they appear to now claim the Connecticut courts erred in holding that FDIC and two private financial institutions did not "take" Petitioners' property in violation of the Fourth, Fifth, Seventh and Fourteenth Amendments to the Constitution. These claims of error – asserted for the first time here – simply do not provide a jurisdictional basis for review by this Court.

Additionally, Petitioners' claims that their constitutional rights were violated are utterly without merit. Petitioners simply do not – and cannot – articulate the legal basis for their claims under the Fourth, Fifth, Seventh and Fourteenth Amendments of the Constitution. Accordingly, the Petition should be denied.

PROCEDURAL AND FACTUAL BACKGROUND

I. The First Trial and First Appeal.

A predecessor in interest of Republic Credit Corporation I ("Republic"), First Constitution Bank ("First Constitution"), instituted this foreclosure action in the Connecticut Superior Court in September of 1989. On September 8, 1992, after a trial on the merits, the court entered a judgment of strict foreclosure in favor of First Constitution. Shortly thereafter, on October 2, 1992, First Constitution became insolvent, and FDIC was appointed its receiver. FDIC was later substituted as plaintiff in lieu of the defunct First Constitution.

On October 8, 1992, Petitioners filed their first appeal to the Connecticut Appellate Court, requesting that the court address certain claims of evidentiary error on the part of the trial court. The Connecticut Appellate Court agreed with Petitioners and remanded the case for a new trial. See First Constitution Bank v. Caldrello, 37 Conn. App. 529, 656 A.2d 1053 (1994). See Respondent's Appendix ("App.") at 13-18.

II. The Second Trial and Second Appeal.

In 1999, this matter was again tried before the Connecticut Superior Court. On October 7, 1999, the trial court issued a memorandum of decision, entering a judgment of strict foreclosure in favor of FDIC. See Petitioners' Appendix at 14-35. The trial court also found that, although Petitioners had asserted counterclaims alleging that First Constitution had improperly exercised a right to set off with respect to certain certificates of deposit, Petitioners had introduced no evidence supporting these counterclaims at trial. Additionally, the trial court noted these same claims had been raised and resolved against Petitioners in a separate action filed by them in federal court.

Finally, the trial court specifically refused to address Petitioners' claims of wrongful conduct on the part of First Constitution and FDIC. The trial court first noted that none of these claims were properly considered because they were not part of the pleadings. Although the trial court recognized its inherent equitable power to adjudicate these issues, it declined to do so because it found the claims to be collateral to the foreclosure

action, and because the claims had already been adjudicated in the separate federal court action.

Petitioners appealed the trial court's decision to the Connecticut Appellate Court. On or about May 10, 2000, during the pendency of this second appeal, Republic purchased the subject note and mortgage from FDIC and acquired all of FDIC's interests in and to the note and mortgage.

The Connecticut Appellate Court affirmed the decision of the trial court in FDIC v. Caldrello, 68 Conn. App. 68, 789 A.2d 1005 (2002). See Petitioners' Appendix at 2-13. This decision is discussed in great detail in Argument Section I.A. below. Petitioners then filed a petition for certification to the Connecticut Supreme Court. See App. at 13-18. This petition was denied on March 14, 2002. See FDIC. v. Caldrello, 260 Conn. 903, 793 A.2d 1088 (2002). See Petitioners' Appendix at 1. Petitioners now seek review of the Connecticut Appellate Court decision via petition for a writ of certiorari to this Court.

III. Factual Misstatements in Petition.

While Republic disputes the relevance of many of the purported "facts" offered by Petitioners in support of the Petition, a

number of the factual liberties Petitioners have taken in their submission to this Court must be addressed.

First, Petitioners make various claims regarding First Constitution's misplacement of funds, its improper release of stock to third parties, its alleged redepositing of funds on a bank holiday and claim that this evidence was not "seriously challenged" at trial. See Petition at 3-5. This evidence was, in fact, challenged and, as discussed above, was rejected by the trial court.

Petitioners also claim that inconsistencies in trial testimony regarding the status of Petitioners' loan give rise to an inference that First Constitution and/or FDIC altered certain documents to support its foreclosure action. See Petition at 5-6. They also contend that that FDIC and/or Republic's failure to produce certain documents is further evidence of wrongdoing. See Petition at 6. These claims were contested by FDIC and fully adjudicated by the trial court, which ultimately rejected Petitioners claims. Petitioners did not challenge any of these findings of fact on appeal to the Connecticut Appellate Court.

While Petitioners claim that they have made "repeated demand" upon Republic for a quit claim deed to certain property

that was inadvertently included in the property description in a tax sale deed to FDIC, this cannot be further from the truth.[1] Indeed, Republic has indicated its willingness to provide a quit claim deed to the City of New London, from which it obtained the allegedly defective tax sale deed, to remedy any claimed damage incurred by Petitioners. Petitioners have never responded to this offer.

Petitioners also make numerous claims regarding FDIC's purported transfer of the subject mortgage and note to Republic. However, while Petitioners claim that FDIC's conduct was wrongful and violated internal procedures, they have not identified any specific policy, regulation or statute forming the basis for their claims.

ARGUMENT

I. The Petition Should be Denied Because Federal Questions were not Properly Raised or Decided Below.

The Petition should be denied because this Court lacks jurisdiction to review issues raised for the first time therein. While Petitioners claim they seek review of the decision of the

[1] Petitioners have filed a separate action in Connecticut state court seeking to quiet title to the subject property. Having lost at the trial court level, Petitioners have appealed that case to Connecticut Appellate Court. That appeal is still pending. Therefore, any issues relating to the tax sale deed are irrelevant to the Petition.

Connecticut Appellate Court in FDIC v. Caldrello, 68 Conn. App. 68, 789 A.2d 1005, cert. denied, 260 Conn. 903, 793 A.2d 1088 (2002), they failed to raise any issue of federal statutory or constitutional law in that appeal. As a result, the Connecticut Appellate Court did not decide any such federal question. Petitioners' petition for review by the Connecticut Supreme Court likewise did not raise the federal constitutional issues which now provide the basis for their appeal to this Court. See App. at 1-12.

As this Court is well aware, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." S. Ct. Rule 10. Moreover, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Id. Rule 10(c), which Petitioners cite as the sole basis for this Court's jurisdiction, states that the Court may grant a petition for a writ of certiorari where

> a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

S. Ct. Rule 10(c). Consistent with Rule 10(c), 28 U.S.C. § 1257 states as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had,

> may be reviewed by the Supreme Court by writ of certiorari where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (emphasis added).

Although Petitioners argue that "special and important reasons" warrant the granting of their Petition and cite violations of their rights under various Amendments to the United States Constitution, their Petition must be denied because Petitioners failed to properly raise these issues in the proceedings below. Petitioners have also failed to clearly and cogently state the manner in which their rights under the Constitution were violated.

A. There Were No Issues of Federal Constitutional or Statutory Law Decided by the Connecticut Appellate Court.

The decision of the Connecticut Appellate Court which Petitioners ask this Court to review, FDIC v. Caldrello, 68 Conn. App. 68, 789 A.2d 1005, cert. denied, 260 Conn. 903, 793 A.2d 1088 (2002), reveals that no federal questions were raised or decided below.

Rather, the Appellate Court opinion decided issues of Connecticut procedural, evidentiary and substantive law that have no constitutional implications and which did not deny Petitioners any rights under the Constitution. The issues decided are clearly set forth in the Appellate Court opinion:

> On appeal, the defendants argue that the court improperly (1) opened the judgment of nonsuit more than twenty months after it had been rendered, (2) allowed the plaintiff, the Federal Deposit Insurance Corporation (FDIC), to introduce certain evidence and testimony of a witness, which had not been disclosed to the defendants until the eve of trial, and (3) failed to adjust the verdict for the undisputed unclean hands of the FDIC.

FDIC v. Caldrello, 68 Conn. App. at 69.

The first issue presented by Petitioners to the Appellate Court – whether the trial court improperly opened the nonsuit entered against the plaintiff – was entirely an issue of state law. Indeed, in determining whether the trial court acted properly, the Appellate Court first examined the language of Connecticut General Statutes § 52-212, the state statute that allows a trial court

to open a nonsuit against a plaintiff.[2] Although the language of General Statutes § 52-212, authorizes a court to set aside a nonsuit within four months of its entry, the Appellate Court – relying upon prior Connecticut Appellate Court decisions[3] – held that the four months contemplated by the statute did not begin to run until plaintiff received notice of the nonsuit. After examining the evidence relied upon by the trial court, the Appellate Court ruled the trial court "had the authority and properly granted the motion to open the judgment of nonsuit." Id. at 74.

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[2] Connecticut General Statutes § 52-212 provides, in pertinent part, as follows:

> (a) Any judgment rendered or decree passed upon a default or nonsuit in the superior court may be set aside, within four months following the date on which it was rendered or passed, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense.

Conn. Gen. Stat. § 52-212 (1991).

[3] See Habura v. Kochanowicz, 40 Conn. App. 590, 592, 672 A.2d 512 (holding that where party does not receive notice of entry of judgment, time for reopening under Conn. Gen. Stat. § 52-212 is extended); Tyler E. Lyman, Inc. v. Lodrini, 63 Conn. App. 739, 747, 780 A.2d 932 (2001) (same).

Next, the Appellate Court addressed Petitioners' claims of evidentiary error and, specifically, their claim the trial court improperly allowed plaintiff to introduce documentary evidence, as well as the testimony of a witness disclosed twelve days before trial. The Appellate Court rejected Petitioners arguments, ruling the trial court did not abuse its discretion in allowing plaintiff to introduce the subject evidence. In so ruling, the Appellate Court noted the evidence was merely "supporting documentation of evidence previously disclosed to defendants." Id. at 77. Therefore, the Appellate Court determined that Petitioners could not claim they were unduly prejudiced. The Appellate Court also noted that, when the trial court asked whether a continuance would be helpful to Petitioners, they responded in the negative. See id.

Finally, the Appellate Court held the trial court did not err in failing to adjust the verdict for plaintiff's allegedly unclean hands. At the trial court level, Petitioners claimed that First Constitution's loss of a $300,000 check somehow caused their inability to pay their mortgage. The trial court refused to reduce the verdict, finding these claims "collateral to the mortgage," especially in light of the fact that the losses claimed were business

losses that were unrelated to the mortgage at issue. The trial court further noted there was no evidence the subject mortgage was unusual or unconscionable, and held that the misplaced check claims had been raised in a separate federal district court action and resolved in favor of FDIC. Id. at 79. Accordingly, the Appellate Court held that the trial court "properly declined to grant equitable relief" to Petitioners. Id.

As indicated above, Petitioners did not properly raise – and the Appellate Court did not decide – any issues relating to the United States Constitution. Nor did the Appellate Court decide any other issue of federal law. Indeed, as discussed above, the decision from which Petitioners seek review via writ of certiorari addresses only issues of Connecticut state statutory and common law and contains no conceivable basis for review by this land's highest Court.

B. It is Well-Settled that the Court Lacks Jurisdiction to Decide Federal and Constitutional Questions not Presented to the State Court Below.

This Court has consistently held that constitutional questions not raised by a petitioner in state court and not decided by that state court cannot be reviewed on writ of certiorari. See

Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Webb v. Webb, 451 U.S. 493, 498-99 (1981). In fact, this Court has recognized this rule as one of the fundamental tenets of its jurisprudence: "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale, 394 U.S. at 438.

In Cardinale, the petitioner asserted a constitutional challenge to a Louisiana statute that required confessions to be admitted in their entirety during a defendant's criminal trial. Although the Court originally granted certiorari to address the constitutionality of the statute at issue, it ultimately held it did not have jurisdiction because petitioner asserted the constitutional challenge for the first time in his petition for a writ of certiorari. In dismissing the writ, Cardinale relied upon Crowell v. Randall, 10 Pet. 368, in which Justice Story concluded that no jurisdiction existed over appeals from state court decisions, "unless a federal question was raised and decided in the state court below." Cardinale, 394 U.S. at 438 (emphasis added). This Court noted that it "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court

decisions" both before and after Crowell. Id. at 438 (citing Miller v. Nicholls, 4 Wheat. 311, 315 (1819); Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 U.S. 334, 342, n.7 (1959); State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 160-63 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-35 (1940); Whitney v. California, 274 U.S. 357, 362-63 (1927); Dewey v. Des Moines, 173 U.S. 193, 197-201 (1899); Murdock v. City of Memphis, 20 Wall. 590 (1875)).

Additionally, Cardinale articulated the "sound reasons" for its consistent refusal to decide federal questions that were not first raised in state courts. Particularly, Cardinale reasoned that cases where federal questions were not raised below are likely to lack an adequate record for review. Id. at 439. This Court also cited the importance of giving state courts the first opportunity to consider the constitutionality of their own laws. See id.

Likewise, in Webb v. Webb, 451 U.S. at 493, this Court dismissed a writ of certiorari in a case where petitioner sought review of a Georgia Supreme Court decision upholding a trial court ruling that petitioner claimed failed to give full faith and credit to a prior Florida judgment.

Specifically, petitioner had filed suit in Florida seeking custody of her son. Fifteen days later, the respondent father filed a similar custody suit in Georgia. A Florida court entered judgment granting the petitioner custody on April 18, 1979. More than two months later, a Georgia court entered a conflicting judgment granting the father custody. After appeal, the Georgia state court decision was affirmed by the Georgia Supreme Court. The mother then filed a petition for writ of certiorari to this Court, requesting that it determine whether the Georgia courts were required by Article IV, § 1 of the United States Constitution[4] to give full faith and credit to the Florida judgment.

Although the Court initially granted the petition for a writ of certiorari, it later dismissed the writ on the basis of the "properly-raised-federal-question" doctrine. See id. at 499-500. As in Cardinale, the Webb Court found the petitioner's failure to raise her federal claim in the state proceedings, and the Georgia Supreme Court's failure to rule on any federal issue, fatal to her

[4] Article IV, § 1 states as follows: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

appeal. See id. at 499-502. The Court took the opportunity to reiterate the policy reasons justifying its declination of jurisdiction:

> There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, [to] construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our workload, this is a very substantial matter.

Id. at 500-501.

The Petition should be denied because Petitioners have failed to properly raise, and the Connecticut state courts have failed to adjudicate, any issue of federal law. While Petitioners claim that this case implicates the Fourth, Fifth, Seventh and Fourteenth Amendments to the United States Constitution, they

fail to cite with specificity any point during the state court proceedings – trial or appellate – where they first made such claims as required by Supreme Court Rule 14.1(g)(i).[5] Petitioners have not indicated where they have properly raised and preserved issues of federal law because they cannot.[6]

Indeed, Republic has not been able to locate any reference to any issue of federal law in the Connecticut Appellate Court's decision in FDIC v. Caldrello, 68 Conn. App. 68, 789 A.2d 1005, cert. denied, 260 Conn. 903, 793 A.2d 1088 (2002). As this Court has indicated, where a state court decision "fails to pass upon a federal question, it will be assumed that the omission was due to

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[5] Supreme Court Rule 14.1(g)(i) states as follows:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

[6] Petitioners have also failed to clearly articulate the basis for each of their constitutional claims.

want of proper presentation in the state courts unless the aggrieved party in this Court can affirmatively show the contrary." Webb v. Webb, 451 U.S. at 493, 495-96 (emphasis added) (quoting Street v. New York, 417 U.S. 40, 50, n. 11 (1974)).

In this case, the assumption that Petitioners never properly raised federal questions before the Connecticut courts is unrebutted by the record. Of initial significance is Petitioners' complete failure to raise any constitutional issues at the trial court level. Their failure to raise these issues at the trial court level precludes them from raising them on appeal to the Connecticut appellate courts and before this Court. See Herndon v. Georgia, 295 U.S. 441 (1935) (dismissing appeal from Georgia Supreme Court because petitioner failed to first raise constitutional issue at trial court level).

Nor did Petitioners properly raise their constitutional claims at the appellate court level. In fact, neither the preliminary statement of issues nor the appellate brief submitted by Petitioners raised any federal constitutional or legal issues.

Petitioners' failure to properly raise federal questions below is further highlighted by their failure to include any

discussion of these issues in their petition for review to the Connecticut Supreme Court. See App. at 1-12. As a result of such failure, this Court's review of these issues would be improper for jurisdictional reasons and for reasons of comity, sound public policy and judicial economy.

C. Grave Miscarriage of Justice is Not a Legally Sufficient Basis for the Assertion of Jurisdiction.

Petitioners proffered reason as to why this Court should grant their Petition – that a "grave miscarriage of justice" would result absent relief – does not remedy their failure to raise constitutional questions below, and does not provide a sufficient basis for this Court's jurisdiction. Indeed, Petitioners' representation that United States v. Beggerly, 524 U.S. 38 (1998), supports the argument that this Court may exercise extra-statutory appellate jurisdiction in cases were a petitioner has shown "grave miscarriage of justice" is entirely disingenuous.

Rather, the primary issue in Beggerly was whether the district court had properly exercised jurisdiction under Federal Rule of Civil Procedure 60(b) in entertaining an action to set aside

a prior judgment in a separate district court action. See id. at 42.[7] Moreover, the court in Beggerly ultimately held that the respondent's allegations that the government failed to "thoroughly search its records and make full disclosure to the Court" did not constitute a grave miscarriage of justice. Id. at 47.

II. Petitioners' Constitutional Claims are Without Merit.

Assuming arguendo, that Petitioners did properly raise their constitutional arguments in the Connecticut state courts, these claims are not cognizable for a number of reasons, including but not limited to, those set forth below.

A. The Seventh Amendment Right to Trial by Jury Does not apply to State Courts.

The Seventh Amendment "relates only to trials in the courts of the United States." Walker v. Sauvinet, 92 U.S. 90, 92 (1875); see also Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 432 (1996).

> The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship,

[7] Both actions were originally filed in the federal district court and involved claims under the federal Quiet Title Act, 28 U.S.C. § 2409a et seq.

> which the States are forbidden by the Fourteenth Amendment to abridge.

Walker, 92 U.S. at 92.

As this matter was tried in Connecticut state court, the Seventh Amendment to the Constitution does not apply, and Petitioners' claims that they were denied their right to a jury trial under the Seventh Amendment are without merit.

B. There was No Unreasonable Search and Seizure in Violation of the Fourth Amendment.

Petitioners have not cited – and Republic has not found – any authority supporting Petitioners' claim that the foreclosure of the mortgage upon their property constitutes an unreasonable seizure under the Fourth Amendment to the Constitution. As with Petitioners other claims under the Constitution, it is respectfully submitted that this claim is entirely without merit.

C. Petitioners Were not Denied Due Process Under the Fifth Amendment and Fourteenth Amendments.

Petitioners were not denied due process under the United States Constitution. In the first instance, Petitioners have no constitutionally protected property rights in the subject property See McCachren v. USDA, 599 F.2d 655, 656-57 (5th Cir. 1979)

(mortgagor has no constitutionally protected property interest in mortgaged property where there is a default under the mortgage giving mortgagee the right to foreclose).

Additionally, Petitioners have been provided with an opportunity to be heard at a meaningful time and in a meaningful manner as is required by the United States Constitution. See Mathews v. Eldridge, 424 U.S. 319 (1976). As Petitioners have conceded, they have participated in two trials of this matter, have made two appeals to the Connecticut Appellate Court and have petitioned the Connecticut Supreme Court to review their claims of error. Petitioners have taken advantage of every available avenue of appeal, and now – in one final attempt to delay the inevitable resolution of this action – Petitioners have requested that this Court grant them a writ of certiorari.[8]

[8] To the extent that Petitioners assert constitutional tort claims against FDIC, such claims have been considered and rejected by this Court. See FDIC v. Meyer, 510 U.S. 471, 114 S. Ct. 996 (1994) (constitutional tort claims against FDIC not cognizable). Nor can the actions of FDIC acting as receiver for First Constitution provide the basis of a due process challenge to a state law. See Warren v. Government Nat'l Mtg. Ass'n, 611 F.2d 1229 (8th Cir. 1980).

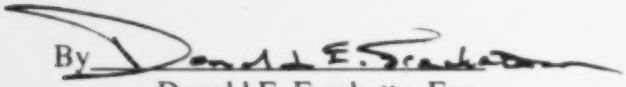
Since Petitioners do not have a constitutionally protected property right and have received more than the process due to them, the Petition should be denied.

CONCLUSION

The Petition should be denied because this Court lacks jurisdiction to decide the federal constitutional questions raised in the Petition for the first time. The Petition should also be denied because Petitioners cannot – as a matter of law – establish that their rights under the United States Constitution were violated.

Dated at Hartford, Connecticut this 11th day of July, 2002.

RESPECTFULLY SUBMITTED,
RESPONDENT REPUBLIC
CREDIT CORPORATION I,
INC.

By 

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No. 01-1837

In The
Supreme Court Of The United States

JOSEPH CALDRELLO AND SANDRA CALDRELLO

Petitioners

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
AND REPUBLIC CREDIT CORPORATION, I

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

APPENDIX

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FDIC v. Joseph Caldrello, et. al., Petition For Review, AC 20144 (2/13/2002) A-1

First Constitution Bank v. Joseph M. Caldrello, et. al., 37 Conn. App. 529 (1995) A-13

SUPREME COURT OF THE STATE OF CONNECTICUT

AC 20144 APPELLATE COURT

FDIC AS RECEIVER FOR FIRST FOR
FIRST CONSTITUTION BANK

V.

JOSEPH CALDRELLO ET AL FEBRUARY 13, 2002

PETITION FOR REVIEW

1. QUESTIONS PRESENTED FOR REVIEW

a. Did the Appellate Court err when it stated that the allegations as to the unclean hands of the FDIC were not raised in the original appeal and subsequently properly not addressed by the trial court?

b. Does alleged fraud committed upon the court allow this court to open the judgment and remand it for a new trial?

c. Did the Appellate Court err in ruling that the defendants were not entitled to equitable relief based on the actions of the First Constitution Bank and its successors in interest?

d. Did the Appellate Court err in finding that there was nothing unusual about the mortgage?

e. Did the Appellate Court err in determining that the trial court had opened the judgment of non-suit for the reason that the

plaintiffs had not received notice thereof, instead of finding that the court had opened the non-suit for reasons of judicial economy?

2. BASIS FOR CERTIFICATION:

The basis of certification is:

a. That there are matters of great public importance involved in that:

i. In that there has been a course of conduct amounting to fraud by public officials, and bank officials perpetrated upon the court, and general public, and that justice requires that the defendants be allowed to present evidence of such to a trial court.

ii. In that the equities in this case require this court to order equitable relief on behalf of the defendants.

b. That the appellate court decided an issue differently from an earlier decision of such court.

3. SUMMARY OF THE CASE

This case is a foreclosure case brought in 1989 by the then First Constitution Bank against the defendants Sandra Caldrello, Joseph Caldrello and others. The matter originally went to judgment, for the plaintiffs, in 1992, and an appeal was filed by the Caldrello family. While the appeal was pending First Constitution

Bank failed and its assets were taken over by the FDIC. The FDIC removed the matter to federal court. The matter was subsequently brought back to the Appellate Court, where these defendants successfully prosecuted the appeal.

The case was remanded back to the trial court, a pre-trial was noticed at which the defendants, but not the plaintiffs, appeared. The plaintiff was non-suited, and more than 18 months passed before the plaintiffs filed a motion to open up that judgment. Such motion was granted, and a new trial was conducted. This opening of the non-suit was one of the basis for the appeal and the appellate court found that the plaintiffs had no notice of the non-suit and that opening it up was therefore justified.

At the trial the defendants introduced evidence of actions on the part of the First Constitution Bank and its successor in interest, the FDIC, and that such action on their prevented Mr. & Mrs. Caldrello from making the mortgage payments, causing this action to be brought. The court ignored this testimony and the appellate court concurred concluding that its introduction was res judicata.

After the trial court decided all issues in favor of the plaintiffs at trial, a new appeal was then taken, and such appeal was denied on January 25, 2002. This petition follows.

4. ARGUMENT

a. It is respectfully submitted that the Appellate Court erred when it stated that the issues as to unclean hands of the plaintiff had not been raised at the time of the earlier appeal (lines 303-311 of the decision), and that therefore it was not properly before the court.

This conclusion is flawed for two reasons. First, the original Appellate Court did note the issues had been raised. It stated that the defendants had filed a counterclaim and then it decided the appeal on one narrow issue. The original Appellate Court specifically did not address the other issues, leaving them for the trial court on remand.

At the trial the defendant addressed these issues. This is really an issue of surprise. The plaintiffs claim a lack of due process. This argument has no weight. Due process requires notice and an opportunity to be heard, see Cantazaro v. City of Middletown, 2nd Cir. (1997). The plaintiffs got that. The plaintiff

knew the claims that the defendants were raising, indeed they had know about them for at least seven years. Any claim that they did not know is just not credible. Indeed the plaintiff acknowledged that they had known of these issues from very early on.

Second, the Appellate Court stated that although the issues were not properly before the trial court the court had discretion to hear them (decision at lines 312-319). The court could not have it both ways. It either has discretion to hear the claims or it did not. It is respectfully submitted that the Appellate Court erred when it concluded that the trial court's conclusions as to the equities was proper holding they were not raised below.

b. It is respectfully submitted that there were frauds perpetrated upon the court by the plaintiff and/or its successor in interest.

It has long been held that if a party perpetuates a fraud upon the court the judgment is subject to being opened. See Hazel-Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). In that case the true author of an article was withheld from the court and the Supreme Court vacated the judgment. The courts have also held that proof of scienter may be inferred from circumstantial evidence.

See Canel v. Lincoln Bank, (Northern District of Illinois, 1998). Also a bank is charged with knowledge of what is in its records. See Curtis v. Connly, 257 U.S. 260 (1921).

It is respectfully submitted that on a number of occasions there have been frauds perpetuated. Some of them are as follows:

i. In that Tim Doheny, former officer of the bank, testified at the first trial as to the origin of certain records and testified differently as to those records at the second trial. He also testified differently about payments and alleged write-downs.

ii. In that the FDIC never produced a large number of documents in discovery that were in its possession.

iii. In that representatives of the FDIC at the second trial misrepresented to the court the true effect of certain bank documents.

iv. At the second trial an officer of the FDIC testified that it was proper to give verbal consent to a tax sale when in fact the FDIC's established procedures required written consent using a specific form.

v. Attorney Kosto agreed not to transfer this property before this litigation had been resolved, and then the FDIC transferred it anyway.

vi. The FDIC produced at trial purported copies of mortgage documents without actually producing the original documents.

These actions on the part of the bank and the FDIC constitute a continuing course of conduct and give rise to a right to a new trial on the merits in front of a jury. See Russell v. Todd, 309 U.S. 280 (1940), and City of Monterey v. Del Monte Dunes Corporation, 119 S. Ct. 1624 (1999).

c. It is respectfully submitted that the Appellate Court erred when it concluded that the equitable claims raised by the defendants were barred on res judicata grounds (decision at lines 333-340.

Under the doctrine of res judicata, a final judgment, when *rendered* on the *merits*, is an absolute bar to a subsequent action between the same parties or those in privity with them upon the same claim, Mazziotti v. Allstate Insurance Co., 240 Conn. 799,812 (1997) emphasis supplied.

However, the doctrine of claim preclusion should be flexible and must give way when its mechanical operation would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal consequences. In re David W., 52 Conn. App. 576, certification denied, 249 Conn. 908, certification granted (as to other issues), 249 Conn. 907, reversed in part (as to other issues) 254 Conn. 676 (1999).

Two requirements for res judicata are identity of cause of action or of issues, and adjudication on the merits, New Milford Block Co. v. Ericson, 3 Conn. Cir. Ct. 1 (1964).

The conclusion of the Appellate Court flies in the face of all of these principles. The decision of the Federal Court was not based on the merits. It was based on procedural matters and there was never a trial on the merits. For that reason the doctrine of res judicata just does not apply.

Furthermore, there is a larger societal issue here. Mr. Caldrello and Mrs. Caldrello deposited a $500,000.00 cashier's check into his personal account. Drawing on those good funds he deposited $300,000.00 into one of his business accounts. These

funds were not properly recorded by the bank, and when inquiries were made, at that time, the bank officials refused to acknowledge any problems or to rectify them. They also took funds belonging to the Caldrello children improperly.

Nor did the bank or FDIC ever make any efforts, at all, as they had a duty to, to inform the Caldrello's creditors what had happened. This seriously injured them and impaired their ability to pay this mortgage.

Substantial trust funds owned by the children were also lost by the bank's malfeasance, also covered up by the bank and FDIC officials.

No one from the bank or the FDIC has ever denied that such occurred. The problems with the checks and the banks failure to address the issue, caused the Caldrello family, Mrs. Caldrello and the three girls included, to lose virtually everything. The plaintiff has hidden documents, and almost certainly destroyed documents. Specifically the FDIC failed to disclose documents as to the sale of a franchise to a Mr. Donald Toresco, about which witnesses for the defendant testified actually existed. The FDIC also did not notify the defendants of an action brought by the FDIC

against the successor company to First Constitution Bank making allegations similar to those made by the Caldrellos.

The situation demands that they be given the justice so far denied to them. This is similar to the Enron situation presently unfolding. Employees and investors losing everything. These situations, this situation, if left unaddressed by the courts, create cracks in the very foundations of our system. It is respectfully submitted that they should have the opportunity to have justice served, and that this court should take this matter.

d. It is respectfully submitted that the Appellate Court erred in finding that there was nothing unusual about the mortgage (decision at 326-328).

It is very important to note that although Mrs. Caldrello signed the mortgage there was no way she could have paid it based on her circumstances. She was a housewife, with three young children and she was not working.

The mortgage was supposed to be a temporary one, providing funds for Mr. Caldrello's businesses until she and her husband could complete a sale of one of his automobile franchises. The money lost by the bank was the first installment of those funds.

In addition the mortgage was a construction mortgage, as evidenced by the loan documentation introduced at trial. This despite the FDIC's assertion to the contrary at the second trial of this case.

e. It is respectfully submitted that the Appellate Court erred in ruling that the trial court had acted properly in allowing the judgment of non-suit to be opened.

The law is quite clear on opening up non-suits after four months. A trial court has no jurisdiction to open a judgment beyond the four month statutory period, Serrano v. Behar, 15 Conn. App. 308 (1988), Mecklenburg v. Pan American World Airways, Inc., 196 Conn. 517 (1985).

It is clear from the record that Judge Hendel opened the non-suit on this case for reasons of judicial economy (April 11, 1997 transcript at 14) after finding that the plaintiff had received notice of the non-suit.

Although the Appellate Court states that Judge Hendel had grounds to find no notice was received (decision at lines 138203), he made no such finding, rather he made a finding that it had gotten

notice. Therefore it is respectfully submitted that the Appellate Court erred and the court should hear this case.

CONCLUSION:

For all of the reasons recited above, it is respectfully submitted that certification should be granted.

CERTIFICATION:

I hereby certify that on this date copies of the foregoing, with attached appendix were mailed to those parties on Exhibit A.

of untrustworthiness since such evidence 'is customarily grist for the jury mill.' " *State* v. *Fullwood*, 193 Conn. 238, 254, 476 A.2d 550 (1984); *State* v. *Rivera*, 32 Conn. App. 193, 202, 628 A.2d 996, cert. denied, 227 Conn. 920, 632 A.2d 698 (1993).

We have already set out in detail the facts that the jury could reasonably have found. On the basis of the evidence before it, the jury could reasonably have concluded, as it did, that the sole proximate cause of the collision was the negligent conduct of the operator of the vehicle in which the plaintiff was a passenger and against whom she elected not to bring an action.

The judgment is affirmed.

In this opinion the other judges concurred.

First Constitution Bank *v.* Joseph M. Caldrello et al.
(11807)

Dupont, C. J., and O'Connell and Landau, Js.

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants, J and S. J and S filed an answer and counterclaim denying that the mortgage note was in default and alleging an improper setoff by the bank against certain certificates of deposit. The trial court rendered judgment of strict foreclosure, from which J and S appealed to this court claiming, inter alia, that that court improperly refused to permit their attorney, M, to testify as to when certain documents had been given to the bank. The trial court, relying on the representations of the bank's attorney, excluded those documents from evidence on the ground that they had not been timely produced in discovery. *Held* that the trial court impropely refused to permit M to testify; an attorney is not automatically barred from testifying in a case because of his status as a legal advocate for a party, and, because the trial court relied on the representations of the bank's attorney without hearing from the person whose responsibility it was to comply with the discovery request, the ruling was not harmless, and a new trial was required.

Argued December 7, 1994—decision released April 11, 1995

Action to foreclose a mortgage on certain real property, brought to the Superior Court in the judicial district of New London, where the named defendant et al. filed a counterclaim; thereafter, the matter was tried to the court, *Hurley, J.*; judgment of strict foreclosure, from which the named defendant et al. appealed to this court. *Reversed; new trial.*

Richard D. Haviland, for the appellants (named defendant et al.).

Gail S. Kosto, for the appellee (plaintiff).

LANDAU, J. The defendants Joseph M. Caldrello and Sandra V. Caldrello[1] (hereafter the defendants) appeal from the judgment of strict foreclosure rendered by the trial court as to property they owned. They claim that the trial court (1) improperly denied Joseph M. Caldrello, appearing pro se, the opportunity to argue at the trial, (2) improperly failed to admit certain bank documents into evidence, (3) improperly failed to permit the defendants' counsel to testify on behalf of the defendants despite having permitted the plaintiff's counsel to testify, and (4) allowed the appearance of an unfair trial. Because we find the third issue dispositive, we need not address the remaining three.

[1] While not involved in this appeal, the following parties were also defendants in the underlying action: Donald M. Toresco; Tim Broyles, doing business as Concrete Concepts; Bank of New Haven; Connecticut National Bank; Allen Electric, Inc.; United Builder's Supply, Inc.; Pioneer Credit Corporation; Denrich Leasing Corporation; Master Lease Corporation; Bell Atlantic Tricon Leasing Corporation; K.L.C., Inc., doing business as Keystone Leasing; Soneco Service, Inc.; Bondi & Lenzini Enterprises, Inc.; Norman Wood General Contractors, Inc.; Fleet Credit Corporation; Day Publishing Company, Inc.; New England Capital Corporation; Transamerica Automotive Finance Corporation; Laurence J. Patton; Midatlantic Commercial Leasing Corporation; Capital Resource Leasing, Inc., doing business as Total Leasing, Inc.; Automatic Solar Covers, Inc., doing business as Poolsavers; Monsignor Paul J. St. Onge; Victor Cartier; Cathy Cartier; and Carl Sherman.

The following facts are not in dispute. In November, 1988, the defendants executed a note and mortgage to First Constitution Bank (bank).[2] The bank commenced an action to foreclose the mortgage in September, 1989, alleging that the note had not been paid according to its terms. The defendants filed an answer and counterclaim, in which they denied that the note was in default and alleged an improper setoff by the bank against certain certificates of deposit owned by the defendants.

The trial court heard the foreclosure action on September 3, 4 and 8, 1992. Appearing in court for the defendants on September 3, were Philip Mancini, an attorney, Joseph M. Caldrello, appearing pro se, and Gregory McCauley, an attorney appearing pro hac vice.[3] The proceedings on that day consisted solely of preliminary matters. When the actual trial commenced on September 4, Mancini was not present. It was agreed that Joseph M. Caldrello and McCauley would represent the defendants at the subsequent proceedings.

During the trial, the defendants attempted repeatedly to introduce documents allegedly prepared by the bank, which purportedly showed that the mortgage was current and that the debt owed by the defendants was

[2] In December, 1992, First Constitution Bank failed and the Federal Deposit Insurance Corporation became its receiver.

[3] In November, 1991, the defendants filed a request for leave to amend their counterclaim, seeking to add lender liability counts arising from the alleged mishandling by the bank of the defendants' personal accounts. McCauley, a Pennsylvania attorney, was admitted pro hac vice in this matter to represent the defendants for the purpose of handling the lender liability issue only. Although the request for leave to amend had been denied on November 6, 1991, McCauley was present on September 3, due to a pending motion to reargue the defendants' request for leave to amend the counterclaim. Also, as a nonattorney pro se, Joseph M. Caldrello could represent only himself and not Sandra Caldrello. See General Statutes § 51-88.

less than the amount claimed by the bank.[4] The bank objected to each offer on the ground that the documents had not been produced in discovery. The court, relying on Practice Book § 232,[5] ruled each time that the documents were inadmissible, but offered the defendants the opportunity to prove their claim that Mancini had given the documents to the bank. On this point, the court heard the testimony of Richard Lathrop, a lay witness who stated that he saw Mancini produce the documents. The court also heard Joseph M. Caldrello's testimony as to when and where various documents were produced. When the defendants attempted to call Mancini, however, the court refused to permit his testimony, noting that he could not be a counsel of record and a witness.[6] In an oral offer of proof, McCauley stated that Mancini would have testified that all of the documents, with one exception, had been given to the bank long before the trial.

Mancini is not automatically barred from testifying in the case because of his status as a legal advocate for the defendants. "An attorney is not disqualified or rendered incompetent to testify when he has participated in the trial of a case, even though testifying as a witness under those circumstances may be violative of the

[4] The documents, all admitted for identification purposes only, were: (1) an escrow analysis dated August 17, 1992; (2) a statement of mortgage account dated December 31, 1990; (3) a statement of mortgage account dated October 24, 1991; and (4) an escrow analysis dated September 11, 1991.

[5] Practice Book § 232 provides: "If, subsequent to compliance with any request or order for discovery and prior to or during trial, a party discovers additional or new material or information previously requested and ordered subject to discovery or inspection or discovers that the prior compliance was totally or partially incorrect or, though correct when made, is no longer true and the circumstances are such that a failure to amend the compliance is in substance a knowing concealment, he shall promptly notify the other party, or his attorney, and file and serve in accordance with Sec. 120 a supplemental or corrected compliance."

[6] The court did allow counsel for the bank to represent that Mancini had not given her the documents in question.

rules of professional conduct and may subject him to disciplinary action. *State* v. *Blake*, 157 Conn. 99, 102, 249 A.2d 232 (1968)." *Puglio* v. *Puglio*, 18 Conn. App. 606, 608, 559 A.2d 1159 (1989). Although an attorney may be in violation of rule 3.7 of the Rules of Professional Conduct,[7] "[t]his does not disqualify or render incompetent, as a witness, an attorney who has participated in a trial, and it is error to refuse to permit him to offer himself as a witness. *Lebowitz* v. *McPike*, 151 Conn. 566, 570, 201 A.2d 469 [1964]; *Miller* v. *Urban*, 123 Conn. 331, 334, 195 A. 193 [1937]; *Sengenbush* v. *Edgerton*, 120 Conn. 367, 370, 180 A. 694 [1935]; *Erwin M. Jennings Co.* v. *DiGenova*, 107 Conn. 491, 497, 141 A. 866 [1928]." *State* v. *Blake*, supra, 102. Furthermore, when Mancini's testimony was offered, it was arguable whether he was representing the defendants since it had been previously agreed that McCauley and Joseph M. Caldrello, pro se, would represent the defendants.

The bank concedes that it was improper for the trial court not to permit Mancini to testify.[8] It argues, however, that the error was harmless. We disagree. In ruling on the admissibility of the documents, the trial court relied on representations made by the bank's counsel that the documents had not been timely produced by Mancini. Although the trial court held a hearing on the

[7] Rule 3.7 of the Rules of Professional Conduct provides in pertinent part: "(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

"(1) The testimony relates to an uncontested issue;

"(2) The testimony relates to the nature and value of legal services rendered in the case; or

"(3) Disqualification of the lawyer would work substantial hardship on the client. . . ."

[8] Both parties argue at some length about the fairness of the trial court's permitting the bank's counsel to "testify" while not permitting the defendants' counsel to do so. The attorney for the bank did not testify, but rather made certain representations in response to a question directed to her by the trial court.

admissibility of the documents and heard from a lay witness that Mancini produced the documents, it failed to hear from the person whose responsibility it was to comply with the discovery requests. We cannot say that the result would not have been different had Mancini, the attorney who allegedly produced the documents, been permitted to testify.

Because the ruling of the trial court was improper and not harmless, we must reverse the judgment of the trial court.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MICHAEL CUTRO
(13315)

LANDAU, SPEAR and FREEDMAN, Js.

Convicted of the crimes of public indecency and risk of injury to a child, the defendant appealed to this court claiming that the state failed to establish beyond a reasonable doubt the necessary elements of the crimes and the required nexus between his actions and the alleged victim. The defendant had been arrested after he was observed masturbating in his car in a public parking lot. He argued that the alleged incident occurred after dark in an area lighted only by street lamps, that there were no other people around and that three cars were parked between his car and the victim's. He also argued that he did not perform a lewd exposure of his body or act wantonly in reckless disregard of the rights of others. *Held:*

1. The cumulative effect of the evidence presented was sufficient to support the defendant's conviction of the crime of risk of injury to a child since the jury reasonably could have found that the defendant's conduct was wilfull and in reckless disregard of its consequences, and created a situation likely to impair the morals of a child; it was not necessary to prove that the child knew what he was doing.
2. The jury could reasonably have concluded that the defendant was guilty beyond a reasonable doubt of public indecency; the evidence supported

(3)

No. 01-1837

Supreme Court, U.S.
FILED
AUG 2 3 2002
OFFICE OF THE CLERK

In The
Supreme Court Of The United States

JOSEPH CALDRELLO AND SANDRA CALDRELLO
Petitioners

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
AND REPUBLIC CREDIT CORPORATION, I
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

REPLY TO BRIEF IN OPPOSITION

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RESPONSE TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' WRIT OF CERTIORARI

This response to the plaintiff's brief in opposition to the defendants' writ of certiorari is filed pursuant to Rule 15.6.

COURSE OF PROCEEDINGS:

The original petition for certiorari was filed by the undersigned on June 11, 2002. A reply brief dated July 11, 2002, was filed by the plaintiffs. This memorandum is filed in response to such reply brief.

ARGUMENT:

This brief memorandum will not address the legal arguments made by the plaintiffs in this case. Although the defendants disagree with those arguments, the legal issues have been framed by both the writ of certiorari and the reply brief such that additional legal argument on the part of the defendants would be repetitive.

However, the defendants do need to point out a concession

made by the plaintiffs, and an inconsistency in their arguments.

The defendants identified a number of acts of the plaintiffs what when combined together amounted to improper behavior on their part.

One such act was the repeated refusal of the plaintiff, Republic, to assist in clearing up title to property to which they acknowledge they had no right.

During the pendency of this foreclosure action the City of New London attempted to sell the property at issue by way of a tax sale. The FDIC was the high bidder. When the tax sale was concluded the City of New London included in its deed to the FDIC, a description of property owned by the Caldrello children. They had no right to do this and that has been acknowledged by everyone. All of this property was then purportedly conveyed to Republic by the FDIC.

Repeated demand has been made upon the City of New

London, the FDIC and Republic for quitclaim deeds of whatever interest they might have back to the Caldrello children, the proper and true owners.

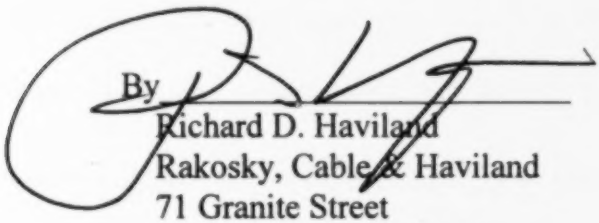
To date Republic has not offered to issue such a deed back to the proper owners. They have offered at various times to quitclaim the property back to the FDIC or to the City of New London. They have never offered to quitclaim it back to the Caldrello children. Their reply essentially claims that they have done so. That is simply untrue.

No one, not Republic, not the FDIC and not the City of New London have issued such deeds.

Republic's and the FDIC's unwillingness to do what is just and proper is just one example of the improper acts that have occurred. See the writ of certiorari for others.

For the reasons recited in the writ of certiorari the defendants respectfully request that their writ of certiorari be granted.

Dated at New London, CT this 15th day of August, 2002.



By _____

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